

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEAN P. KELLEY

Claimant

VS.

JMMT, INC.

Respondent

AND

**KANSAS TRUCKERS RISK
MANAGEMENT GROUP**

Insurance Carrier

Docket No. 1,048,436

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 26, 2010, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Gary K. Jones, of Wichita, Kansas, appeared for claimant. Kevin J. Kruse, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant had been injured by an accident that occurred out of and in the course of his employment with respondent. Accordingly, the ALJ ordered all medical to be paid by respondent, that Dr. Nazih Moufarrij was authorized as claimant's treating physician, and that temporary total disability benefits be paid claimant beginning October 20, 2009, until he is released from medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 20, 2010, Preliminary Hearing and the exhibits and the transcript of the January 11, 2010, deposition of Tyler Ford, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant did not suffer personal injury by accident while employed at respondent, that claimant's alleged injury did not arise out of and in the course

of his employment with respondent, and that claimant failed to give respondent timely notice of his alleged injury.

Claimant contends that he was injured in an accident that arose out of and in the course of his employment with respondent and that he gave respondent timely notice of his accident.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by an accident that arose out of and in the course of his employment with respondent?

(2) If so, did claimant give respondent timely notice of his accident?

FINDINGS OF FACT

Claimant worked for respondent as a truck driver. On October 20, 2009, he was involved in an accident in Florida while driving his truck and trailer. He was on his regular route. Paramedics, the fire department, the Florida highway patrol, and the local sheriff responded to the accident. Claimant told the paramedics and firefighters that he had pain in his right shoulder from the seat belt. The paramedics suggested that he be seen at the hospital, but he said he could not leave his truck unattended. Claimant did not notice any back pain after the accident when he was talking to the firefighters and paramedics.

Claimant contacted respondent and reported the accident within a few minutes after it happened. He told both Mary Capps, the office manager, and James Mies, respondent's owner, that no one was injured in the accident. Claimant now says that was correct as far as he knew at the time.

Claimant was required by Florida law to sit out for eight hours after being involved in an accident. He went to the nearest truck stop and called respondent to let them know he had to take off the eight hours. It was after those eight hours that claimant noticed that he was stiff and sore. He continued his route and made deliveries to three cities in Florida. He was not required to do any unloading at those stops. While making those deliveries, he noticed his right foot and lower calf started going numb. On October 23, he drove to Miami and his trailer was reloaded. Claimant testified that before he went to Miami, he talked to Mr. Mies and told him he was having trouble with his back from the accident. He said Mr. Mies' response was to tell him he needed to get his loads off, and claimant continued to Miami, and then to Shreveport, Louisiana. In Shreveport, claimant was required to unload two pallets of flowers by hand, and he had difficulty doing the unloading.

Claimant returned to Wichita on October 26. He said he picked up his paycheck from Ms. Capps and told her he was kind of messed up. He said at that time he had a conversation with Mr. Mies to the effect that because claimant had been involved in two

accidents that year, he would not be able to pull Excel's loads. Therefore, Mr. Mies would not be able to use him anymore. He admits he did not say anything to Mr. Mies about his low back at that time.

After claimant returned home on October 26, his back got worse gradually. He went to the emergency room at Via Christi Regional Medical Center (Via Christi) on November 3, 2009, about two weeks after the accident, because his back was in a bad spasm. He could not eat or sleep the four-day period before he went to the hospital. He had extreme pain in his low back and right buttock, and he had no feeling in his right leg. Claimant testified he told the Via Christi personnel that he had been in an accident. The emergency room records show that he had been in a motor vehicle accident 5-7 days earlier. Via Christi's discharge summary indicates that claimant reported being in an accident approximately six days before, that he began having pain the next day, and the pain got progressively worse. Claimant testified he did not know where Via Christi came up with a time period of six days before admission. Six days before November 3 would have been October 28, and claimant agrees that he was not driving for respondent on October 28.

While at Via Christi, claimant had an MRI, which showed he had a right-sided disk herniation at L4 to L5. Claimant was told he would be having emergency surgery on his back. While claimant was in the emergency room, before the MRI was done and before Via Christi determined that he needed emergency surgery, Via Christi personnel contacted respondent. Claimant was told by Via Christi personnel that respondent denied that he worked for them.

Dr. Moufarrij performed an L4-L5 partial laminectomy, an L4 foraminotomy, and a right L4 to L5 discectomy on claimant's back on November 4, 2009. Dr. Moufarrij has prescribed physical therapy, but claimant has not gone because his claim was denied.

Claimant admitted that he had two previous back surgeries, one after a 1990 work-related injury and another in 2003, after he had been injured in a second work-related injury in 2002. He was able to return to work as a truck driver after his 2003 surgery, although he suffered chronic back pain and has been on methadone and Roxicodone for pain management since 2003. Claimant testified that the pain and symptoms he had after the October 2009 accident were different than the pain and symptoms he had previously. He had no numbness in his right leg at any time before the October 2009 accident.

Claimant testified that after his 2003 surgery, he continued to have muscle spasms in his low back from time to time, his back would lock up on him at times, and he would have extreme pain at times. He used a back brace to help with his back pain and to provide support to his back. He was in a pain management program and saw Dr. Alan Albarracin monthly. Claimant had seen Dr. Albarracin on October 8, 2009, and the medical note of that visit indicates that claimant reported daily persistent back pain, worse at times, which affected his activities of daily living and his sleep. Claimant testified that his pain had not affected his sleep, and he did not recall making that statement on October 8, 2009.

Claimant initially went to work for respondent in March 2009. He took a preemployment drug test, which he passed. He denied he stopped taking his narcotic medication before taking the preemployment drug test. On the morning of the October 2009 accident, he took methadone. He stated that the methadone he took did not in any way impair his driving.

On May 8, 2009, claimant was involved in a one-truck motor vehicle accident while driving for respondent. He was not injured in that accident, but he was given a citation in that accident. He was contacted by Tyler Ford, a safety inspector for respondent, following the May 2009 accident, and he told Mr. Ford about his citation. Mr. Ford required him to take a drug test following that accident. He tested positive for speed or Amphetamine. Claimant admitted using speed or Amphetamine, stating that he took the speed to complete a long trip. Subsequent to testing positive for speed or Amphetamine, claimant was terminated by respondent, but respondent hired him back in October 2009. He took another preemployment drug test at that time. Claimant said he had not taken any speed or Amphetamines anytime during his entire trip to Florida.

James Mies testified that claimant began working for him in March 2009. Claimant did not tell him that he had two prior low back surgeries, that he had permanent work restrictions, or that he used narcotic pain medication on a regular basis.

Mr. Mies said he spoke with claimant on the day of the October 2009 accident. He asked whether anyone was hurt and whether the truck was driveable. He also said he told claimant to contact Tyler Ford. Claimant told him he had to speak with the state trooper and would get back with him later. When claimant called Mr. Mies later, he told Mr. Mies that no one had been hurt in the accident. Mr. Mies said he spoke with claimant at various times during claimant's trip in Florida, and at no time did claimant tell him he had injured his low back in the October 20 accident. He denied claimant told him he would have difficulty making the delivery to Shreveport from a physical point of view. He testified the first time he became aware that claimant was claiming he injured his low back was when respondent got the call from Via Christi. Mr. Mies admitted that during the second conversation he had with claimant after the accident, claimant told him he was sore, but he thought claimant was talking about his upper back being sore from the seat belt.

Mr. Mies, during his conversations with claimant after the accident, told claimant that Mr. Ford would be calling him. At some point, he found out that claimant did not return Mr. Ford's calls. Mr. Mies testified that if claimant had been injured in the October 20 accident, he would have been required by Department of Transportation (DOT) regulations to take a drug test.

Mary Capps, respondent's office manager, testified that on October 20, 2009, she received a call from claimant letting her know he had been in an accident. She asked him if anyone had been injured, and claimant told her that no one was injured but that his vehicle was going to have to be towed. Ms. Capps testified that she told claimant that Mr.

Ford would be calling him, as that was routine procedure after an accident. She said that claimant told her he would keep his cell phone on. The next day, Ms. Capps received a call from Mr. Ford who told her he had not been able to reach claimant, that he had left numerous messages for him, and he wanted to verify the number. Ms. Capps verified that she gave Mr. Ford the correct number, then she called claimant and told him he needed to get hold of Mr. Ford. Claimant told her he would do that. The number Ms. Capps used to call claimant was the same number she had given Mr. Ford.

Ms. Capps said that claimant did not tell her he had injured his low back during her second telephone conversation with him. The first time she knew claimant was claiming an injury from the October 2009 accident was when she received a call from Via Christi. She was given an accident date of October 28 by Via Christi, and she told the Via Christi personnel that claimant's last day was October 26.

Tyler Ford testified that he is a safety consultant for trucking companies. He had been doing safety consulting for respondent for three years. Part of his duties would be to advise whether drug and alcohol testing needed to be done following an accident, reporting the accidents to the insurance company, and completing accident reports. He handles communications with the trucking company's workers compensation carriers in case of a work-related injury.

Mr. Ford spoke with claimant after the May 2009 accident. He called claimant on his cell phone and asked him, among other things, if he had been cited for a moving violation, and claimant said he had been given a ticket for careless driving. Mr. Ford then told Ms. Capps that claimant needed to have a drug and alcohol test. Claimant had the test, the results of which were positive for amphetamines. It was Mr. Ford's understanding that claimant had been terminated by respondent at that time, but that he had been rehired.

Mr. Ford was made aware of claimant's October 20, 2009, accident when he received a telephone call from Ms. Capps. Mr. Ford then tried to call claimant's cell phone, and claimant did not answer. Mr. Ford left a message telling claimant to contact him to give him the details of the accident. Mr. Ford did not get a return call from claimant. Mr. Ford called claimant four more times, leaving messages each time that he needed to speak with him. Claimant never returned his calls.

Claimant testified that the cell phone he had at the time of the October 2009 accident was one that he could make long distance calls on, but he was not able to receive long distance calls. Although both Mr. Mies and Ms. Capps testified they called and spoke with claimant on his cell phone while he was in Florida, claimant testified they could not have done so and that he was the one who called them. He also testified that he did not know if the cell phone he had in October 2009 had a message system.

Chrissy Buck, respondent's bookkeeper, testified that she saw claimant on October 30, 2009, when he came to pick up his paycheck. She said claimant appeared to be in a good mood and was very friendly. She said he did not appear to have any problems walking or with his back. He did not tell her he was having any low back problems.

Clayton Buck is respondent's fleet manager. He spoke with claimant on October 20, 2009, when claimant called trying to get hold of Mr. Mies. Claimant had been in an accident and was waiting for a tow truck. Mr. Buck asked claimant if anyone had been injured in the accident, and claimant said he did not believe so. When claimant returned to Wichita on October 26, Mr. Buck spoke with him in the parking lot. Mr. Buck made a comment that it was good that no one had been injured in the accident, and claimant responded that he did not think anyone had been injured. During neither conversation did claimant tell Mr. Buck that he had injured his low back in the accident.

PRINCIPLES OF LAW AND ANALYSIS

(1) Did claimant suffer personal injury by an accident that arose out of and in the course of his employment with respondent?

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.²

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

¹ K.S.A. 2009 Supp. 44-501(a).

² *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.³

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁴ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁵ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁶

Claimant testified about his October 20, 2009, truck accident. There is no question that the accident occurred. Claimant initially only experienced pain in his right shoulder area. It was not until later that he noticed additional symptoms, including symptoms in his low back. Nevertheless, claimant was able to continue driving. He completed his deliveries and returned to Wichita on October 26, 2009. Claimant did not seek medical treatment for his low back until November 3, 2009, which was after he had been terminated by respondent.

Claimant's testimony is supported in part and is contradicted in part by respondent's witnesses. There are some discrepancies concerning when claimant called respondent and what was said. The hospital emergency room record also contains a history for the date of accident which does not match the actual date of the truck accident in Florida. Nevertheless, the hospital contacted respondent because claimant reported the motor vehicle accident occurred while working for respondent. Furthermore, there is no evidence of claimant having been involved in any subsequent accident. But claimant did have a history of chronic low back pain, for which he apparently was receiving medical treatment shortly before the accident.

³ *Id.* at 278.

⁴ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁵ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁶ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

The ALJ obviously found claimant's testimony to be credible because he awarded compensation. Although there are some troubling inconsistencies in claimant's testimony, this Board Member agrees with the ALJ that for purposes of preliminary hearing, claimant has met his burden of proving that he sustained personal injury by accident arising out of and in the course of his employment with respondent on the date alleged.

(2) Did claimant give respondent timely notice of his accident?

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The Workers Compensation Act requires that claimant give notice of an accident, not of an injury. Claimant reported his truck accident to respondent on the date it occurred, stating the time, place and particulars of the accident. He also reported an injury to his shoulder area. He was not aware of his back injury until later. His delay in reporting that his low back was also injured in the accident does not prevent this claim for compensation.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁸

⁷ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁸ K.S.A. 2009 Supp. 44-555c(k).

CONCLUSION

(1) Claimant suffered personal injury by accident on October 20, 2009, that arose out of and in the course of his employment with respondent.

(2) Claimant gave respondent timely notice of his accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated January 26, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Gary K. Jones, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge